

**U.S. DEPARTMENT OF LABOR
Board of Alien Labor Certification Appeals
WASHINGTON, D.C. 20001-8002**

'Notice: This is an electronic bench opinion which has not been verified as official'

DATE: April 2, 1997

CASE NO. 95-INA-300

In the Matter of:

CAMBEX CORPORATION, Employer

on behalf of

DENES BARICZA, Alien

Before: Holmes, Huddleston and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arises from the Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer (CO) of an application for alien labor certification. Certification of aliens for permanent employment in the United States is governed by § 212 of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) and Title 20, Part 656 of the Code of Federal Regulations (CFR).

Employers desiring to employ an Alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.¹

¹We base our decision on the record upon which the CO denied certification and the Employer's request for review as contained in the appeal file (AF) and any written arguments. 20 C.F.R. §656.27(c).

STATEMENT OF THE CASE

Application. The Employer filed an Application for Alien Employment Certification (ETA 750A) on October 26, 1993 to permit it to employ the Alien permanently as a Test Engineer II with the following duties:

PERFORMS ELECTRONIC ENGINEERING DESIGN ASSIGNMENTS WHICH RESULT IN THE DEVELOPMENT OF LOGIC TESTERS. INVOLVES A BASIC TO MODERATE DEGREE OF COMPLEXITY INCLUDING THE DEVELOPMENT AND UTILIZATION OF ELECTRONIC ENGINEERING (HARDWARE, SOFTWARE, FIRMWARE AND TEST) PLANS AND PROCEDURES. MODERATE LATITUDE FOR INDEPENDENT ACTION AND DECISION MAKING BUT CLOSE SUPERVISION WILL APPLY ON NEW ASPECTS OF ASSIGNMENTS. CONDUCTS ANALYSIS, MAINTENANCE AND TESTS OF ROUTINE COMPLEXITY PERTAINING TO THE NEW DESIGNS AND EXISTING EQUIPMENT AND MAKES APPROPRIATE RECOMMENDATIONS.

AF 66. The Employer identified the nature of its business as involving Computer Storage, Manufacturing and Sales and its address as 360 Second Avenue, Waltham, Massachusetts. It noted further in the ETA 750A that it required any U.S. applicant to have a Bachelor's degree in Electrical Engineering; two years training in memory sub-systems; two years in the advertised position and one year experience in analog and digital design of micro-code driven test equipment. The rate of pay for the position was stated on the initial ETA 750A as \$804.00 per week.

In a Statement of Qualifications of Alien (ETA 750B) the Alien asserted on October 12, 1993, that he had a Master's Degree in Electronic Engineering and was presently in the United States under a H-1B visa. In item 15 of the statement, which calls for a list of all jobs held by the Alien during the past three years, he said he was employed by the Employer as a Test Engineer since November 1990 and that he previously worked as a Development Engineer for Merkantek KFT in Budapest, Hungary, from July 1989 to September 1990. His other experience was as a Design Engineer for Interflex KFT in Hungary in 1988 and 1989. AF 69. In his description of his duties in each of these positions he did not indicate that they involved supervision of any other employees.

Recruitment. On January 5, 1994, the Massachusetts Department of Employment of Training unit responsible for the initial processing of the application advised the Employer that the special requirements listed on Form 750A appeared restrictive and seemed to indicate that the position was tailored to meet this Alien's qualifications. The Employer was informed that any experience gained by the Alien in his present position could not be counted towards his overall qualifications for the position.

AF 63. The Employer advertised the position for three days on or about February 15, 1994. The advertisement noted that the job site/interview was in Waltham, Massachusetts. The Employer received twelve resumes as the result of the advertisement. Employer listed the twelve applicants in an office communication dated March 22, 1994, noting eleven were unqualified for the Test Engineer II position and that one person did not respond to Employer's request for an interview. AF 13-14. In the Employer's Recruitment Report of April 14, 1994, it said that of the twelve applicants for the position, Shiquan Yang was interviewed for the position but was unqualified, and that Donald Bistany, the only other person Employer sought to interview, did not respond to phone calls or a letter requesting an interview. AF 12. All of the remaining applicants were rejected on grounds that they lacked the requisite work experience.

Notice of Findings. The CO issued a Notice of Findings (NOF) on October 14, 1994 in which he proposed to deny certification because of the following deficiencies:

I. Actual Minimum Requirements. Citing 20 CFR § 656.21(b) (6), the CO said that on reviewing Form 750, Part B and Alien's qualifications, it appeared that he did not possess the minimum qualifications of two years experience as a Test Engineer II and one year experience with Analog and Digital design of microcode driven test equipment. The CO also observed that the Alien did not appear to meet the minimum requirements in Form ETA 750, Part A, #15. The CO concluded that it appeared the Employer was willing to hire the Alien without the proficiency of the actual skills as described in the minimum requirements, suggesting that the actual requirements were not truly the minimum requirements. The Employer was instructed to provide documentation showing that the Alien satisfied all of the minimum requirements prior to his employment in the position for which certification is sought. In the alternative, Employer was informed that it could reduce the requirements and amend the application. AF 11.

II. Rejection of Qualified U.S. Workers. The CO also said it appeared that U.S. workers may qualify for the job offered. As a result, the CO said, the Employer must file clarifying evidence as to its minimum requirements for the position. AF 10, 11.

Rebuttal. On November 16, 1994, the Employer filed a letter from Leslie Koch, Vice President of Human Resources for Cambex as its rebuttal. Employer said that its listed criteria for the position of Test Engineer II were minimum requirements for the job, and that it would not be feasible to hire workers with less training or experience. Also, Employer said additional work experience by the Alien was unintentionally omitted from Form ETA 750A, as the Alien worked as a Hardware Engineer for TEXO KFT in Budapest, Hungary from June 1986 through May 1988. The Employer

explained that the Alien's duties in this position, included the design of microcode driven logic testers, writing interface code in C and writing microcode, and that he also had participated in the design of digital interface circuitry, which included Digital/Analog converters. Employer then said that while there is no title such as Test Engineer in Hungary, a Hardware Engineer performed the same duties, as the Alien's work experience matched the background Employer was seeking when he was hired. AF 08-09. The Employer also said in rebuttal that it would cost a great deal of money to train someone to replace the Alien and that it had invested several thousand dollars in his training and development. AF 09.

Final Determination. On November 29, 1994, the CO denied certification in a Final Determination(FD). The CO observed that in response to his request for documentation of the Alien's qualifications for the position offered, the Employer presented the Alien's past job experience as a Hardware Engineer at TEXO, where the Alien's job duties were the design of microcode driven logic testers, writing microcode, and designing digital interface circuitry. The CO explained that the NOF did not question the Alien's qualifications as a Test Engineer I, but as a Test Engineer II, concluding that the Employer had not stated that the Alien had experience performing several of the functions listed as special requirements for the position it offered. Also, the CO took particular note of Employer's admission that it had employed the Alien for four years, that the Alien had in this way acquired several thousand dollars worth of training, and that because of the training that the Employer provided the Alien acquired some of the minimum requirements in the job at issue. The CO commented that these factors did not justify retaining an Alien who does not meet the minimum requirements, however. AF 04-06.

Review. On December 22, 1994, the Employer filed motion for reconsideration and request for review, in which it contended that the Alien had four years of experience in the special field where Cambex was seeking when he was hired, and reiterated that there is no Test Engineer II job title in Hungary. In addition, Employer said that while it erred in failing to prove the Alien's knowledge in basic areas of Electrical Engineering, the Alien's Diploma Evaluation, which was part of the application, was proof that the Alien was qualified in basic elements of Electrical Engineering when he was hired. The Employer again asserted that the Alien is a key employee and it could not afford to lose him without significant hardship and expense.² AF 02-03.

²The CO denied the Motion for Reconsideration as it did not raise issues which could not have been addressed in the rebuttal. He then forwarded an appeal file to the Board for administrative-judicial review of the denial of certification and the matter is considered to be before the Board for such

DISCUSSION

I. Actual Minimum Requirements. 20 CFR § 656.21(b)(5)³ requires that

The employer shall document that its requirements for the job opportunity, as described, represent the actual minimum requirements for the job opportunity, and the employer has not hired workers with less training or experience for jobs similar to that involved in the job opportunity or that it is not feasible to hire workers with less training or experience for jobs similar to that involved in the job opportunity or that it is not feasible to hire workers with less training or experience than that required by the employer's last job offer.

The CO cited this regulation in the NOF and again questioned whether the Alien possessed the minimum requirements for the position offered. In addition, the CO said it appeared that the employer was willing to hire the Alien without proficiency in the skills described in the minimum requirements, which suggests that the actual requirements for the position were not the minimum requirements stated in the application. In the FD the CO noted that the Employer presented the Alien's past job experience at TEXO in his native Hungary in response to the CO's request for documentation of the Alien's qualifications. The CO then questioned the Alien's qualifications as a Test Engineer II, and found that his job duties in Hungary did not cover the minimum requirements Employer required of a Test Engineer II. The CO then found that the Employer failed to disclose that the Alien had worked for two years in the job as Test Engineer II that the Employer offered and that the Employer did not establish that the Alien had experience performing several special requirements for the position of Test Engineer II before it hired him. The CO concluded for these reasons that the Alien did not possess the minimum requirements for the position offered. The CO observed that the Employer's expense in training the Alien and Employer's possible hardship in replacing the Alien, if needed, were not reasons that justify continued employment of the Alien, if he did not meet the minimum requirements of the position at issue. 20 CFR § 656.21(b)(5).

We agree with the CO's finding that the Employer failed to

purpose.

³ While the CO refers to 20 CFR § 656.21(b)(6) in the NOF and FD, 20 CFR § 656.21(b)(5) is the regulation that discusses the actual minimum requirements for a position. This error is harmless, as it did not affect the CO's disposition of the case.

demonstrate that the Alien possesses the required experience for this position independent of his experience gained while employed by the Employer. The Employer has the burden of proving that the Alien possesses the minimum requirements it has stated for the position. **Charley Brown's**, 90-INA-345 (Sept. 17, 1991). Under 20 CFR § 656.21(b)(5), certification is properly denied where the alien fails to meet employer's stated job requirements. **Marston & Marston, Inc.**, 90-INA-373 (Jan. 7, 1992).

It is fundamental that the experience as a Test Engineer that the Alien acquired while working for the Employer will not be counted to satisfy the work experience requirement. In answer to the CO's direction to document its claim that the Alien was qualified for the position of Test Engineer II, the Employer responded by asserting in rebuttal that in Hungary, a "Hardware Engineer" performs the same duties a "Test Engineer" does in the United States. Contending that his Hungarian experience as a Hardware Engineer served as the Alien's qualifications for the position it offered, the Employer then said the Alien worked from June 1986 through May 1988 as a Hardware Engineer in Hungary. Employer then said his work as a Hardware Engineer gave the Alien experience in the design of microcode driven logic testers for regulator units, in writing interface code in C, in writing microcode, and included also the designing of digital interface circuitry for digital and analog converters. The requirements stated by Employer for the position of Test Engineer II, however, also required two years of experience in the position offered, with specific additional experience demanded beyond the work of a Test Engineer I that included coordinating the fabrication of newly designed testers; training personnel in the operation of test equipment; knowledge in utilization and maintenance of transmission line theory; and experience in debugging IBM memory subsystems and ABEL.⁴

Contrary to the argument in Employer's Motion to Reconsider and its contention in the letter from Mr. Koch that the Alien's experience as a Hardware Engineer with TEXO entailed the same duties as a Test Engineer, the burden is on Employer to establish that the job responsibilities performed by the Alien in Hungary were similar to those required of a Test Engineer II. **Charley Brown's**, supra. Also, the CO reasonably requested in the NOF, that the Employer clarify the Alien's qualifications by producing evidence that he met the actual minimum requirements for the position it has offered. **Adler K. Chia**, 93-INA-153 (Jan. 31, 1995).

Noting that the Employer failed to sustain its burden of

⁴ Administrative notice is taken of the Dictionary of Occupational Titles, published by the Employment and Training Administration of the U. S. Department of Labor.

proving these facts, analysis of the Alien's experience as a Hardware Engineer in Hungary indicates that while he may have the required background in designing microcode driven logic testers and digital interface circuitry, there is insufficient evidence to establish that the Alien had two years experience in many of the special requirements of the Test Engineer II position. Such experience includes coordinating fabrication of newly designed testers, training personnel in operation of newly designed testers, and knowledge of the utilization and maintenance of logic testers and transmission line theory and experience with C and ABEL. For these reasons it is affirmed that on its face the Alien's experience as a Hardware Engineer in Hungary falls short of meeting the qualifications required for the job at issue, if his experience with the Employer is not taken into consideration. **Hagopian & Sons, Inc.**, 94-INA-178 (May 4, 1995).

Moreover, the Employer has the burden to establish that the Alien fulfills the minimum requirements for the position offered, **Hagopian & Sons**, supra. As the Employer's documentation that the Alien meets its minimum requirements is unsubstantiated, it does not constitute credible evidence that the Alien has met these requirements. **MITCO**, 90-INA-295 (Sept. 11, 1991); **Wings Wildlife Production, Inc.**, 90-INA-69 (Apr. 23, 1991). The reason for this finding is that the Employer provided nothing more than a written statement from Mr. Koch noting the Alien's experience with TEXO in Hungary as its response to the CO's direction to provide evidence documenting the Alien's qualifications for the Test Engineer II position, such as a sworn statement from the Alien describing his job duties as a Hardware Engineer or an affidavit from TEXO establishing the job requirements of a Hardware Engineer in Hungary. It follows that the Employer has failed to sustain its burden of proof that the Alien possessed the minimum requirements for the current job at the time it first hired him. **Best Trend, Inc.**, 94-INA-170 (May 4, 1995); **MITCO**, supra. Consequently, the Employer has failed to prove that the Alien possessed the minimum job requirements.

Accordingly, the following order will issue.

ORDER

The Certifying Officer's denial of labor certification is hereby Affirmed.

For the panel

FREDERICK D. NEUSNER
Administrative Law Judge

I concur in the result.

JOHN C. HOLMES
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.

BALCA VOTE SHEET

Case Name: CASE NO. 95-INA-300

CAMBEX CORPORATION, Employer
DENES BARICZA, Alien

PLEASE INITIAL THE APPROPRIATE BOX.

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Thank you,

Judge Neusner

Date: March 14, 1997

